No. 11173.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,

Appellants,

vs.

THE PENFIELD COMPANY OF CALIFORNIA AND ALFRED W. YOUNG,

Appellees.

REPLY BRIEF.

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Statement of Jurisdiction.

This is an attempted appeal from the judgment of the United States District Court imposing a fine upon Alfred W. Young as Secretary of the Penfield Company of California. The appellant is the Securities and Exchange Commission. Alfred W. Young, appellee, was fined and paid the fine, thus rendering the same moot and exhausting the jurisdiction of the court, but the Securities and Exchange Commission, seeking to review the order of the District Court of the United States for the Southern District of California, Central Division, on July 2, 1945, imposing the now satisfied fine upon the appellee, Alfred W. Young. The attempted jurisdiction of this court is invoked under Section 128 of the Judicial Code as amended (28 U. S. C. 225) (Appellant's Brief, p. 2).

The appellees contend that the order of the District Court imposing the fine which has been paid ended the matter and that the Securities and Exchange Act does not give jurisdiction to this court to review the order of the District Court finding the appellee in contempt as the penalty which the court in its discretion deems appropriate.

Section 22(b) of the Securities Act of 1933 provides as follows:

> "In case of contumacy or refusal to obey a subpoena issued to any person, any of the said United States Courts, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides, upon application by the Commission may issue to such person an order requiring such person to appear before the Commission, or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; *and any failure to obey such order* may be punished by said court as a contempt thereof."

Section 385 of Title 28 provides the power to punish for contempt. It reads as follows:

> "Sec. 385. (Judicial Code, Section 268.) Administration of oaths; contempts. The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto

as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts. (R. S., Sec. 725; Mar. 3, 1911, c. 231, Sec. 268, 36 Stat. 1163.)"

Title 28, U. S. C. A., Section 385.

The sole power to punish for contempt both in law and in equity is derived from the above statute.

Asbestos S. & S. Co. v. Mansville Co., 189 Fed. 611;

Kirk v. Milwaukee etc. Co., 26 F. (2d) 501.

At common law, contempt judgments were not reviewable on appeal.

Bassette v. Conkey Co., 194 U. S. 329, 48 L. Ed. 1002.

While the defendant may secure a review of a contempt judgment, we have been unable to find cases where jurisdiction has been taken in a case such as this.

If the court does hold that there is jurisdiction and the court holds further that the appellants' position is tenable, then we ask that the court consider our cross-appeal on the grounds that the evidence is entirely insufficient.

Statement of Facts.

While the appellant's brief sets forth a statement of facts, much is left untold in the statement, and concerns matters which have been or are before this Court.

On an appeal from the order of the District Court granting the Securities and Exchange Commission's petition for a *subpoena duces tecum,* an application was made to the Circuit Court for a stay of mandate pending an appeal to the U. S. Supreme Court. Counsel for the Securities and Exchange Commission informed the Honorable Judge Denman that if such a stay was granted, their investigation would be frustrated and they would not be able to secure the evidence which they desired in order to complete the investigation. Yet it was only a short time thereafter that the Federal Grand Jury of Los Angeles returned an indictment against the appellees and the individuals named in a matter of some fifty counts, based on the very documents and papers which appellants sought in the *subpoena duces tecum.* [R. 72.]

At the conclusion of a lengthy jury trial, in which all of the possible evidence was produced before the trial court, and many thousands of dollars spent, the defendants were acquitted and the defendants were discharged from custody.

It was thereafter that the Commission came into court and sought the enforcement of an order which, to put it mildly, had become moot in respect to the books and records of the case. The court, finding this defendant guilty of contempt, in view of all the facts before it, not only of which he could and did take judicial knowledge [R. 98], but of all the proceedings had in the present case, fined the defendant $50.00 for disobedience of the order of

the court. When the court discussed the matter of the disposition of the case, Mr. Cuthbertson, counsel for the Securities and Exchange Commission, said:

> "So far as the punishment which the court might see fit to impose, that is up to the court. We are still anxious to get a look at these books and records so I suggest to the court, if he be so disposed, whatever punishment the court might see fit to impose would be in connection with or so long as he refuses to produce his books and records for our inspection." [R. 86.]

The court replied:

> "I do not think I am going to be disposed to do anything like that.
>
> "I sat here for six weeks and listened to books and records. The Government produced people from all over the United States in connection with the Penfield matter." [R. 86.]

From this order fining Young the Government has appealed, on the contention that this was a civil contempt proceeding and that the court below had *no discretion* but to impose "a remedial, coercive penalty designed to compel compliance with the mandate of this court." (Appellant's Brief p. 7.)

The Commisison would substitute its judgment for that of the court and tell the court what order or judgment it should impose in the case, and it has misread the statute.

The statute says:

> "In case of contumacy or refusal to obey a subpoena issued to any person," etc., ". . . and any failure to obey such order of the court may be punished *by said court* as a contempt *thereof.*"

The language of the statute is permissive. It states that a failure to obey the order of the court may be punished *by said court* as a contempt *thereof.* It does not say failure to obey an order of the Commission must be punished by said court as the Commission would have it punished as a contempt of the Commission.

The right to punish for contempt has long been a subject of discussion, but the power to do so or the right to determine the extent of the punishment has not been delegated to any Commission of the United States as yet. Even the power of the court is circumscribed.

Bridges v. California, 314 U. S. 252;
Wilson v. United States, 26 F. (2d) 214.

It is true, as pointed out in appellant's brief, that there is a distinction between contempt in civil proceedings and criminal contempt. Where, however, the civil contempt is for a disobedience of the court's order, the court in its discretion may impose a judgment for the wrongful conduct or may impose a punitive fine. If the court imposes a punitive fine, it is punitive in the public interest, to vindicate the authority of the court and to deter other like derelictions.

Ex parte Grossman, 267 U. S. 87, 69 L. Ed. 527;
Stewart v. U. S., 236 Fed. 838.

Once the fine is imposed, the jurisdiction of the court is at an end.

In re Bradley, 318 U. S. 50, 87 L. Ed. 608.

In connection with its seeking the enforcement of the subpoena, the court had power to consider that in a trial covering approximately ten weeks, that the Securities and Exchange Commission had produced before the court, contracts for the bottling of whiskey issued by the Bourbon Sales Corporation, which they had produced by bringing into court all the books and records of the Bourbon Sales Corporation, all of the statements of all of the purchasers (approximately fifty) and the circumstances under which the statements were made, all of the information regarding the value of whiskey owned by the purchasers covered by the bottling contracts, the time within which the whiskey covered by such contracts was to be bottled, the price at which the whiskey was to be sold after it was bottled, the capitalization of the Bourbon Sales Corporation—these were matters for which the members of the staff of the Securities and Exchange Commission said they wanted to investigate the Penfield Company!

The court had before it all the records of the Bourbon Sales Corporation, produced by that company, all salesmen's kits produced by the former President of Penfield Company, a government witness.

See:

Penfield of California v. Securities & Exch. Com., 143 F. (2d) 746.

The court could see before it that practically everything which the Security and Exchange Commission had asked for in its order had already been produced before it by other persons. The only purpose, then, in a finding and adjudication of contempt, was punishment. This the court imposed as it saw fit.

The recent decision in *Parker v. United States,* 153 F. (2d) 66, sustains respondent's contention and theory above set forth.

It holds that in civil contempt there can be no coercive sentence where for any reason the complainant has become "disentitled to the further benefit of the order," because "the complainant is the real party in interest"; also, it held that where a fine is imposed in a civil proceeding "it must not exceed the actual loss to the complainant caused by respondent's violation of the decree."

In the instant case the District Judge made it plain that he did not consider that the complainant had suffered any loss in that behalf and he clearly pointed out that the conditions had so changed that complainant was not entitled to further benefit of the order originally made for its benefit, for the reason that the identical matters directed by said order to be produced, had been secured elsewhere and placed before the grand jury.

Cross-Appeal.

Although we did not file any appeal, the appellees, the Penfield Company of California, and Alfred W. Young, file the following cross-appeal in the event our contentions are not sustained on the main appeal.

The grounds of our cross-appeal are:

I.

The Court Erred in Holding That the Evidence Was Sufficient to Find the Defendant Guilty of Contempt.

The sole basis of the contempt order was an affidavit by Charles R. Burr that on January 16, 1945, he addressed and caused to be deposited in the United States Mail a communication to A. W. Young, Secretary-Treasurer of the Penfield Company of California, in the form and content of Exhibit B hereto, advising A. W. Young that your affiant would call at the offices of the Penfield Company on January 24, 1945, for the purpose of examining the books and records referred to in the order dated June 1, 1943. [R. 6.]

On January 24, 1945, when Burr appeared, A. W. Young was out of the city and had been for a month. The record shows that affidavits were filed and before the court. The affidavits were not included in the record by the appellants, but the record shows that both the appellee and his counsel were out of the city at the period of service and that there was no subpoena or any other notice served on Mr. Young, other than in the form of a letter from Mr. Burr. He said he would call, and that is all that he did. [R. 82.]

The court held as follows:

"The Court: The affidavit of the defendant Young indicates that he was absent from the city from January 11 to February 3, so the question now is whether or not his mere absence from the city is sufficient to exculpate him from the order of the Court.

I think that the order is pretty definite, that he should have made the books and records available to Mr. Burr, and even though he were absent from the city I think he should have made some provision so that the examination could have been had, because the order to produce the books and records was made in the alternative, to examine them at their office as an accommodation to the defendant in order to prevent him from having to physically bring the books and papers to the office and interrupt his business. I think the order is definite enough that it should have been obeyed.

The question now is whether or not, as I have indicated, his absence from the city is sufficient to excuse him. I don't believe that it is, Mr. Lavine. I think that he should have provided some means or some person so that they could have been available."

It is respectfully submitted that a more substantial showing should have been made by the Securities and Exchange Commission and that the showing was not sufficient to warrant the order of contempt.

It has been held that where the proceeding is regarded as criminal in character, the guilt of the accused must be proved beyond a reasonable doubt.

Michaelson v. U. S., 266 U. S. 42, 67 L. Ed. 162;

Gompers v. Buck Stove and Range Co., 221 U. S. 418, 55 L. Ed. 797;

Hoteling v. Superior Court, 191 Cal. 501.

In any event, a proof of contempt must be clear and convincing and must show a wilful disregard of the court's order.

Since contempt is defined as a "disregard for, or disobedience of the order or command of the court," intent to commit the contempt is usually necessary.

State ex rel. Webb v. District Court, 37 Mont. 191, 95 Pac. 593;

State v. McGahey, 12 N. D. 535, 97 N. W. 865;

Regina v. Payne, 1 Q. B. 577, 19 English Ruling Case 246.

Therefore, since there was no proof in this case of any intent to disregard the order or the request at the time it was made, the proof was entirely insufficient.

It is respectfully submitted, therefore, that the affidavit is entirely insufficient to have found the defendant guilty of contempt, and that the judgment and order finding him guilty of contempt should have been reversed.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Appellees and Cross-Appellants.